Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates	))))	**WC Docket No. 03-228**

COMMENTS OF AT&T CORP.

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TABLE OF CONTENTS

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Pursuant to the Commission's Public Notice, DA-03-3742, released November 21, 2003, AT&T Corp. ("AT&T") hereby submits the following comments on the Commission's *Notice Of Proposed Rulemaking*, WC Docket No. 03-228, FCC 03-272, released November 4, 2003 ("*Notice*").

INTRODUCTION AND SUMMARY

In section 272, Congress provided that a Bell Operating Company ("BOC") must offer long distance services not on an integrated basis but through an affiliate that receives no better treatment from the BOC than do unaffiliated rivals and that is "separate" from and that "operate[s] independently" of the BOC. 47 U.S.C. §§ 272(a), (b)(1), (c). Despite these provisions, the BOCs already are permitted to share with their § 272 affiliates legal, financial, and all other administrative services as well as marketing, research, and other network-related functions. The *Notice* asks whether the Commission could also authorize, consistent with the Act's "operate independently" requirement in § 272(b)(1), the BOCs (i) to own jointly with the § 272 affiliates core network facilities like switches, transmission facilities, and the premises housing those facilities and (ii) to operate, install and repair the network facilities of the § 272 affiliates. The answer is plainly no.

As AT&T has previously shown, allowing the BOCs to erode these core consumer protections would make a mockery of Congress's requirements of truly separate and operationally independent affiliates that are prohibited from receiving preferential treatment from the BOC. The Commission has previously found that Congress "principally designed" the operate independently requirement precisely to prevent integration of the BOC's local network facilities with the long distance facilities of the § 272 affiliate – and did so regardless of the efficiencies that could be achieved if those networks could be integrated. Indeed, even if Congress had omitted the exceptionally broad "operate independently" requirement in § 272(b)(1), Congress's separate affiliate requirement in § 272(a) would by itself act as a complete "bar" to the integration of the BOC's local and long distance facilities. That is because, as the Commission has found, preventing integration of local and long distance network operations is the "*sine qua non*" of a separate affiliate requirement. Eliminating the existing and longstanding prohibitions on joint ownership of switching and other network facilities and joint provision of operating, installation and maintenance ("OI&M") services would – as the term "operating" confirms – permit substantial integration of network operations and thereby make the BOCs' § 272 separate affiliates into mere shell corporations that would render meaningless Congress' separate affiliate requirement.

For these reasons, Congress itself has already addressed the Commission's inquiries raised in its *Notice* and has determined that the BOCs and their § 272 affiliates shall remain truly separate and operationally independent.[1] Particularly in light of the Commission's own past decisions stretching back nearly 25 years, the Commission's determination in 1997 that

[1] Because § 272(e)(4)'s non-discrimination requirements also underpin these requirements, the structural separation measures at issue are not tied solely to the provisions of § 272 that may be limited in duration.

it is "not at liberty" to depart from Congress's decision to bar the BOCs from integrating and jointly operating local and long distance facilities remains undoubtedly correct today. The Commission could not hope to explain adequately how it could, just when all the BOCs have now been authorized to offer long distance, suddenly reverse decades of precedent.

Any decision authorizing joint ownership of switching and transmission facilities and the associated land and buildings would also run afoul of the stringent and unqualified prohibition against BOC discrimination that Congress enacted in section 272(c) and 272(e). That is because joint BOC-affiliate ownership of switching and other core network facilities is inherently discriminatory and provides the § 272 affiliate with obvious advantages over unaffiliated long distance providers. This analysis applies at least as strongly to the OI&M restriction, because Congress' clear command that the affiliate "operate independently" cannot be satisfied when BOC "operates" (and installs and maintains) network facilities on the affiliate's behalf. That is, removing the restriction would allow *dependent* operation.

Accordingly, even if the Commission believed that still further integration of the BOCs with their section 272 affiliates were a desirable policy outcome, Congress has forbidden that change in policy by requiring the BOC to maintain separate and operationally independent affiliates that are afforded no better treatment than rival long distance carriers. But the fact of the matter is that both the ban on joint OI&M and on joint ownership remain the best regulatory tools to implement section 272's purposes of preventing cost misallocation and discrimination.

The Commission (along with the Department of Justice) has already determined that joint provision of OI&M and joint ownership of networks would create "substantial opportunit[ies]" for cost misallocation and that it would be *less* burdensome to ban those joint activities altogether than to expend more regulatory resources to attempt to police them through other means. And as AT&T explains below and has previously detailed, both of these rules, for example, minimize the magnitude of the joint and common costs that the BOC and its § 272 affiliates incur, which reduces the inherently arbitrary cost allocations that must occur to prevent the BOCs from loading costs onto local services and thereby injuring ratepayers of services not subject to effective competition. Further, the existing rules barring joint ownership and joint OI&M make transactions regarding network facilities far more transparent, and therefore make it far easier to detect unlawful discrimination and preferences that are granted to the § 272 affiliate. Again, elimination of these rules would require more regulatory resources to monitor the BOCs' network operations to ensure that subtle – or less than subtle – discrimination was not occurring at the expense of competition. Further, other existing regulations cannot sufficiently deter and detect BOC misconduct that would result from permitting joint ownership and joint network operations, installation and maintenance.

Given Congress' clear requirements for truly independent and separate affiliates, the BOCs' costs of compliance with the joint ownership and joint OI&M prohibitions are simply not relevant. But, despite numerous opportunities, the BOCs have never demonstrated that the costs of compliance are in fact significant – indeed, one BOC has admitted that it incurs no such costs and another admitted that the costs were minimal relative to revenues. And, most importantly, the BOCs have never shown using actual marketplace evidence that the Commission's independent operation rules hinder the BOCs' ability to compete effectively in the long distance market – any handicaps imposed by the Commission's rules merely mimic the competitive difficulties that unaffiliated long distance providers face because of the BOCs' enduring local power over local services that are key inputs into long distance services. All that section 272 and the Commission's rules do, when properly interpreted and enforced, is ensure a "level playing field" between the BOCs' long distance operations and those of rival carriers. The Commission's rules in no way tilt that playing field to handicap the BOCs' § 272 long distance affiliates.

BACKGROUND

As the Commission previously has determined, section 272 is necessary to implement the "fundamental postulate underlying modern U.S. telecommunications law" – namely, that the BOCs will "have both the incentive and ability to discriminate against competitors in [all] retail markets" until their monopoly local telephone markets become fully competitive.[2] In particular, section 272 imposes safeguards that are designed to prevent or detect abuses of market power and that apply after a BOC is granted long distance authority under section 271 of the Act, which commands that BOCs be allowed to provide in-region long distance services when their local markets are merely *open* to competition. Section 272 thus reflects Congress' recognition that, even after a BOC is permitted to provide long distance service in a state, it will continue to have substantial market power in its local markets in that state and that "the local exchange market will *not* be fully competitive immediately upon its opening" when a BOC obtains long distance authorization.[3] Congress understood that a BOC will then regain the incentives and abilities both (i) to discriminate against their new long distance rivals in providing "services and facilities that its affiliate's rivals need to compete" and

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[2] *Applications Of Ameritech Corp. And SBC Communications Inc., For Consent To Transfer Control*, 14 FCC Rcd. 14712, ¶¶ 12, 190 (1999) ("*SBC-Ameritech Merger Order*").

[3] *See, e.g.,* First Report and Order, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 11 FCC Rcd. 21905, ¶¶ 9-13 (1996) ("*Non-Accounting Safeguards Order*"); *Regulatory Treatment of LEC Provision of Interexchange Services*, 12 FCC Rcd. 15756, ¶ 134 (1997) ("We recognize that, as long as the BOCs retain control of local bottleneck facilities, they could potentially engage in improper cost allocation, discrimination, and other anticompetitive conduct to favor their affiliates").

(ii) to "allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures," thereby obtaining an "artificial advantage" in retail pricing relative to its rivals.[4]

As the D.C. Circuit has described, Section 272 "sets out a series of formal structural and transactional obligations intended to check LECs' incentive to leverage their bottleneck assets into market power over other telecommunications services," *ASCENT* v. *FCC*, 235 F.3d 662, 667 (D.C. Cir. 2001), and thereby undermine existing long distance competition and stifle fledgling competition in local markets.[5] In particular, section 272 is "designed, in the absence of full competition in the local exchange marketplace, to prohibit anticompetitive discrimination and cost-shifting."[6]

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[4] *Non-Accounting Safeguards Order* ¶¶ 9-13. Further, the BOC will have the incentive and ability to "create a 'price squeeze'" by charging rival "firms prices for inputs that are higher than prices charged, or effectively charged, to the BOC's section 272 affiliate." *Id.* ¶ 12. Then, "the BOC affiliate could lower its retail price to reflect its unfair cost advantage, and competing providers would be forced either to match the price reduction and absorb profit margin reductions or maintain their retail prices at existing levels and accept market share reductions." *Id.*

[5] *See Non-Accounting Safeguards Order* ¶¶ 9-13, 206; 142 Cong. Rec. H 1171 (daily ed. Feb. 1, 1996) (statement of Rep. Conyers) (explaining that the safeguards are needed "to check potential market power abuses"); Joint Explanatory Statement of the Comm. of Conference, 104th Cong., 2d Sess., H.R. 104-458, at 151 (Jan. 31, 1996) *reprinted in* 1996 U.S.C.C.A.N. 10 (explaining that the safeguards are "necessary to protect consumers [and] to prevent anticompetitive behavior"); *see also Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 490-91 (2002) (a dominant local carrier can "place conditions or fees . . . on long-distance carriers seeking to connect with its network" and, "[i]n an unregulated world, another telecommunications carrier would be forced to comply with the[] conditions" the dominant local carrier imposed, or else the competing carrier "could never reach the customers of a local exchange") ("*Verizon*").

[6] *Non-Accounting Safeguards Order* ¶ 9; *see id*. ¶¶ 9-19, 206; *see also* Second Order on Reconsideration, *Implementation of the Non-Accounting Safeguards,* 12 FCC Rcd. 8653, ¶ 5 (1997) ("Congress . . . enacted section 272 to respond to the concerns about anticompetitive discrimination and cost-shifting that arise when the BOC enters the interLATA services market in an in-region state in which the local exchange market is not yet fully competitive") ("*Second Non-Accounting Safeguards Reconsideration Order*"), *aff'd Bell Atlantic Tel. Cos.* v. *FCC*, 131 F.3d 1044, 1046 (D.C. Cir. 1997).

Section 272 prescribes numerous structural, transactional, and non-discrimination safeguards that apply to a BOC's provision of long distance services, including a requirement that all such services be offered through a truly separate affiliate. Section 272(b), in particular, specifies a minimum number of "structural and transactional requirements" and requires that the BOC's 272 affiliate:

> (1) shall operate independently from the [BOC];
>
> (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate;
>
> (3) shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate;
>
> (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]; and
>
> (5) shall conduct all transactions with the [BOC] of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

47 U.S.C. § 272(b). In 1996, the Commission adopted rules to implement § 272, including section 272(b). With respect to section 272(b)(1)'s "operate independently" requirement, the Commission "concluded that [the requirement] entails four important restrictions," *Second Non-Accounting Safeguards Reconsideration Order* ¶ 12, specifically, (1) no joint BOC-affiliate ownership of switching and transmission facilities; (2) no joint ownership of land and buildings on which such facilities are located; (3) no provision of OI&M services by the BOC (or non-section 272 affiliate) on the section 272 affiliate's facilities and (4) no provision by the section 272 affiliate of OI&M services for the BOC's facilities. *Non-Accounting Safeguards Order* ¶¶ 156-61; 47 C.F.R. § 53.203(a).

The Commission found that these rules were necessary to prevent integration of the networks of the BOC and its section 272 affiliate, which was the "*sine qua non* of a separate affiliate requirement." *Second Non-Accounting Safeguards Reconsideration Order* ¶ 12. As the Commission recounted its regulatory history, it found that prohibitions against joint ownership of switching and transmission facilities and joint OI&M were bedrock requirements of separate affiliate requirements, having been set forth as far back as 1980. *See Non-Accounting Safeguards Order* ¶¶ 150-51, 163 (citing *Computer II*, 77 F.C.C.2d 384, ¶¶ 210-14, 233-42, 261-64 (1980) and *BOC Separations Order* 95 F.C.C.2d 1144, ¶ 70 (1983)) These rules also directly served the two core purposes of section 272 – preventing discrimination and cost misallocation.

Moreover, the Commission determined that the OI&M and joint ownership rules in fact led to a *reduced* amount of regulation, because they "avoid[] the need to allocate the costs" of the prohibited actions "between BOC activities and the competitive activities in which a section 272 affiliate may be involved."[7] Further, these rules "reduce the potential for a BOC to discriminate in favor of its section 272 affiliate" because they "increase the transparency" of transactions between the BOC and the affiliate regarding such activities so that, as Congress intended, rivals to the BOC's long distance affiliate can "enjoy the same level of access to the BOC's" facilities as the affiliate. *Non-Accounting Safeguards Order* ¶¶ 159-60, 163.

The Commission recognized that its rules barring these joint operations might impose efficiency costs on the BOCs and their affiliates, but found that the rules were nevertheless necessary to check BOCs' incentives and abilities to engage in anticompetitive abuses. The Commission sought to "strike an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination." *Id.* ¶ 167. Accordingly – and even

[7] *Non-Accounting Safeguards Order* ¶¶ 159, 163; *see also* Third Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, 1999 WL 781649 (FCC, Oct. 1, 1999), ¶ 20 ("*Third Order on Reconsideration*").

though many commenters, including the Department of Justice as well as industry participants, advocated a complete separation of the BOC and its § 272 affiliate for all purposes – the Commission declined to require additional separation requirements pursuant to § 272(b)(1). *See Non-Accounting Safeguards Order* ¶¶ 167-70; *Third Order On Reconsideration* ¶¶ 13-19 (citing comments); Reply Comments of the United States Department of Justice, at 10, CC Docket No. 96-149 (filed Aug. 30, 1996) ("The Department agrees" with an approach that requires "maximum separation" and "firmly prohibit[s]" discrimination because "[l]ess than full separation reintroduces the very opportunities to misallocate costs that separation was intended to defeat." Excessive "sharing would make cost misallocation possible even in a regime of extensive record keeping by the BOC and vigilant auditing by the Commission. The Commission could not practically detect any but a miniscule percentage of the occasions on which BOC personnel devoted unrecorded time to affiliate problems") ("DOJ 272 Comments"). Even though there was an ample record on which the Commission could have justified far more stringent separation and independent operation requirements, the Commission did not prohibit – apart from the particular requirements in § 272(b)(2)-(5) and the "core functions" (*Third Order on Reconsideration* ¶ 20) related to the networks of the BOCs and their § 272 affiliates – sharing of any other operations and expressly permitted joint provision of administrative and marketing operations. *Non-Accounting Safeguards Order* ¶¶ 167-70, 178-83.

In 1997 and again in 1999, the Commission re-affirmed the rationale behind its implementing rules, finding that section 272(b)(1) was "principally designed to prevent substantial integration of the local operating company's local network facilities and the separate affiliate's long distance network facilities." *Second Non-Accounting Safeguards Reconsideration Order* ¶ 37; *see Third Order On Reconsideration* ¶ 20. According to the

Commission, Congress was aware in 1996 of the ongoing and "well-known regulatory debate" between the BOCs, which asserted that allowing their entry into long distance markets on an integrated basis using combined facilities would generate operational efficiencies, and other parties, which claimed that the anticompetitive dangers of allowing the BOCs to place "the design, construction, and operation" of core network facilities used to provide both local and long distance services were substantial. *See Second Non-Accounting Safeguards Reconsideration Order* ¶¶ 47-48. In enacting sections 271 and 272, Congress "ended the debate with respect to interLATA services and decided the issue legislatively" by adopting a "bar on the integration of a BOC's local facilities and the additional BOC facilities to provide competitive services." *Id.* ¶¶ 49-50. As the Commission concluded, it was "not at liberty to depart from that decision during the period in which the statutory separate affiliate requirements are in effect" and could not allow the BOCs to integrate their networks with those of their § 272 affiliate. *Id.*

I. THE ACT, THE COMMISSION'S PRIOR DETERMINATIONS, AND THE POLICY CONSIDERATIONS UNDERLYING THEM REQUIRE THE COMMISSION TO RETAIN ITS PROHIBITION ON JOINT OWNERSHIP OF SWITCHING AND TRANSMISSION FACILITIES, AND THE LAND AND BUILDINGS HOUSING THOSE FACILITIES.

A. Permitting Joint Ownership of Switching And Transmission Facilities Would Violate § 272(b)(1)'s "Operate Independently" Requirement and § 272's Non-Discrimination Requirements.

Congress has already provided the answer to the questions raised by the Commission's *Notice* with respect to joint ownership of switching and transmission facilities: the Act has determined the "balance" between (i) alleged increased RBOC efficiency gains from integrated operation, as here proposed, and (ii) the need for provision of bottleneck services and facilities on a non-discriminatory basis and provision of competitive services through an affiliate that "operate[s] independently." §§ 272(b)(1), 272(c)(1), 272(e)(4). These statutory requirements exist without regard to the integration efficiencies that may arise from non-independent operation of facilities and by creating inherently discriminatory arrangements, which allowing such joint ownership would ensure, and the Act precludes any further "balancing" that undermines those requirements. Congress has chosen to impose requirements that will necessarily lead to efficiency losses due to lack of integration, and has done so to achieve the competition objectives that this Commission has repeatedly found to be advanced through, and, at the core of, structural and transactional separation requirements.

Joint ownership of switching and transmission facilities inherently involves "common" rather than "independent" operation of facilities and the related provision of services. As the Commission previously concluded, by enacting § 272(b)(1), Congress has already determined that, for at least three years after a BOC obtains long distance authorization pursuant to section 271, the BOC must not be permitted to provide long distance services "on an end-to-end, physically integrated basis." *Second Non-Accounting Safeguards Reconsideration Order* ¶¶ 47-48; *Non-Accounting Safeguards Order* ¶¶ 159-60. Rather, the BOC must keep separate its "local facilities and the additional BOC facilities necessary to provide competitive services such as interLATA services." *Second Non-Accounting Safeguards Reconsideration Order* ¶ 50. Section 272's unqualified "bar on integration" of a BOC's local and long distance facilities is the "*sine qua non* of a separate affiliate requirement" and the Commission has previously concluded that it is "not at liberty to depart" from Congress's decision. *Id.* ¶¶ 49-50. Thus, the broad requirement in § 272(b)(1) that the BOC's § 272 affiliate must "operate independently" from the BOC necessarily prohibits joint ownership of core network facilities, such as switching, transmission, and the land and buildings housing those facilities, and the Commission would violate § 272(b)(1) if it sanctioned such joint ownership.

If affiliated entities are using a single, integrated network to provide both monopoly services and competitive services subject to § 272(b)(1), there clearly is no "separate" subsidiary that is "operat[ing] independently" to provide the competitive service. As the Commission itself explained, if the "BOCs were permitted to provide interLATA services on an integrated basis, it is hard to understand why Congress would choose to require that a separate affiliate 'operate independently' of the BOC, or more importantly, why it would choose to require a separate affiliate at all." *Second Non-Accounting Safeguards Reconsideration Order* ¶ 51. If the term "operate independently" has any meaning at all – and it must – then it inevitably includes a requirement that the BOC's § 272 affiliate keep its network operations, such as switching and transmission facilities, separate from those of the BOC. In the absence of this and a few other key requirements, a BOC's § 272 affiliate would operate merely as a shell corporation – with separate books, officers, and employees – but would not be truly independent, as Congress required in section 272(b)(1). *Cf.* THE AMERICAN HERITAGE DICTIONARY, 3d Ed. (defining "independent" as "[f]ree from the influence, guidance, or control of another or others; self-reliant"). By enacting section 272, Congress plainly did not intend for the BOC's long distance affiliates to be nominally separate only on paper, but rather to be truly independent so as to deter and detect the "discrimination and improper cost allocation that have always been understood as the justification for the imposition of a separate affiliate requirement" – and because the risk of these abuses is "most present" when long distance services "are being provided on an integrated basis," the separate affiliate and operational independence requirements cannot be read to permit joint ownership of network, facilities like switching and transmission. *Second Non-Accounting Safeguards Reconsideration Order* ¶ 50.[8]

[8] In this regard, section 274(b) also contains a requirement that a BOC maintain a separate affiliate that is "operated independently" from the BOC when it provides electronic publishing.

To be sure, the term "operate independently" may not have a plain meaning in all circumstances, *see Third Order On Reconsideration* ¶ 14, but it plainly and clearly precludes a range of outcomes and rationales – including permitting jointly owned and operated network facilities to be deemed as "independent" operation, as well as justifying eliminating barriers to integration based on the efficiencies created by that impermissible integration. As the D.C. Circuit has previously admonished the Commission, the fact that a statutory provision has no single plain meaning "does not convert the [provision] into a sort of Rorschach test, permitting the Commission to read into the word anything it pleases." *CF Communications* v. *FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997). The words Congress uses impose limitations, and the Commission is not free to disregard them and seek to obtain the level of regulation that the Commission deems to be appropriate. *Cf. ASCENT*, 235 F.3d at 667; *MCI* v. *FCC*, 765 F.2d 1186, 1194, 1196 (D.C. Cir. 1985) (deference does not leave the FCC "at liberty to release [itself] from the tie that binds it to the text Congress enacted," or grant it "unfettered discretion to regulate or not regulate"). In 1996, the Commission sought to interpret the text of § 271(b) to "strike an appropriate balance" between permitting vertical efficiencies between a BOC and its § 272 affiliate and protecting competition and consumers from anticompetitive abuses that result when a dominant local carrier integrates long distance operations. *Non-Accounting Safeguards Order* ¶ 167. Even though the Commission could plainly justify far more rigorous separation

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The section contains nine different requirements that a BOC must follow in order to operate the affiliate independently. *Id*. § 274(b)(1)-(9). Some of the 9 requirements also appear in § 272, while others – such as a requirement that the BOC and the electronic publishing affiliate "own no property in common" (§ 274(b)(5)(B)) – do not. In harmonizing § 272(b)(1) and § 274(b), the Commission rejected claims by the BOCs that the exclusion of some § 274(b) items (such as joint property) from § 272(b)(1) forbade the Commission from imposing similar requirements pursuant to § 272(b)(1). *Non-Accounting Safeguards Order* ¶ 157. Indeed, it would require special justification for the Commission to eliminate a requirement under § 272(b)(1) that Congress expressly determined was necessary for independent operation under § 274(b).

and operational independence requirements, it chose to limit its rules implementing § 271(b)(1) to the ban on joint OI&M and joint ownership of switching and transmission. Eliminating those requirements now would obliterate the balance that the Commission drew in 1996 and would render the Commission's interpretations of § 272 arbitrary and unlawful, for the Commission will have entirely eviscerated Congress' intent to require BOCs to offer long distance services through separate affiliates that operate on a truly independent basis.[9]

Congress has also and separately precluded joint ownership of switching and transmission facilities through the Act's non-discrimination provisions. *See* §§ 272(c)(1); 272(e)(4). Any such common ownership will necessarily preclude non-affiliated competitors of the RBOCs from negotiating and acquiring comparable interests in the RBOC switches and transmission facilities. Multiple competitors would leap at the opportunity to purchase interests in those facilities appropriate to their needs rather than incurring the costs of acquiring, deploying and collocating stand-alone switches and transmission facilities. Yet denying comparable opportunities to competitors would clearly amount to discriminating in favor of the RBOC affiliate "in the provision or procurement of goods, services, facilities, and information," § 272(c)(1), as well as amount to "provid[ing] any facilities, services or information concerning its provision of exchange access to the affiliate" without having "such facilities, services or information … made available to other providers of interLATA services in that market on the same terms and conditions." § 272(e)(2).

[9] In this regard, when the Commission has previously imposed a separate affiliate requirement – as it has, for example, with respect to provision of enhanced services by dominant firms and provision of long distance services by non-dominant, independent incumbent local exchange carriers – it has typically imposed far more rigorous separation and operational independence requirements. *See, e.g.*, *Computer II*, 77 F.C.C.2d, ¶¶ 233-60. And most significantly, the Commission has never required a separate affiliate *without* also prohibiting joint ownership of property such as switching and transmission. *Id.* ¶¶ 239-40; Fifth Report & Order, *Competitive Carrier*, 98 F.C.C.2d 1191, ¶ 9 (1984); *see Third Order On Reconsideration* ¶ 27; *infra* Part I.B.

In the same manner as § 272(b)(1), these provisions clearly and plainly speak precisely to the question posed by the *Notice* and eliminate any policy discretion for the Commission to rely upon any efficiencies created by discriminatory integration to allow the RBOCs to provide such preferential treatment to its affiliates. Joint ownership as suggested by the *Notice* is inherently discriminatory and thus foreclosed by the Act.

B. Permitting the Joint Ownership of Switching and Transmission Facilities Would Create Insurmountable Inconsistencies with Prior Commission Determinations and Policies.

Even if the Act did not preclude the Commission from permitting discriminatory arrangements between BOCs and their affiliates and inherently non-independent provision of competitive services, prior Commission determinations and policies create an insurmountable obstacle to the proposed volte-face.

When an agency reverses its prior, considered position, its actions are constrained by the nature and extent of its prior determinations and reasoning. The Commission can, of course, alter its view of the public interest, but must provide a "satisfactory explanation for its action, including a rational connection between the facts found and choices made" in light of its prior findings and reasoning. *Motor Vehicle Manuf. Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). And the Commission must overcome the presumption established by the scope and nature of its prior actions. "A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress," and thus creates a "presumption that those policies will be carried out best if the settled rule is adhered to." *Id.* at 41-42 (internal quotation omitted).

Permitting joint ownership of switching and transmission facilities would represent both an impossibly difficult repudiation of the Commission's policy reasoning regarding discrimination and cost allocation, *see infra* pp. 17-21, and, more importantly, a repudiation of the Commission's consistent view that such integration is inconsistent with independent operation that is the "sine qua non" of separation requirements and the statutory touchstone in this case. No changed facts or intervening statutory changes have undermined or can plausibly be said to have displaced the Commission's prior conclusion that such joint property ownership "would permit such substantial integration of the BOCs' local operations with their interLATA activities as to preclude independent operation, in violation of section 272(b)(1)." *Non-Accounting Safeguards Order* ¶ 159. This conclusion was separate and independent from the cost allocation and discrimination policy concerns that also supported the Commission's conclusion and, because grounded in the nature of separate operations, was independent of consideration of any costs arising from lost integration efficiencies.

Indeed, the Commission's prior determinations that would be repudiated are embodied not only in the *Non-Accounting Safeguards Order*, but also in landmark decisions that defined the nature of separate subsidiary requirements. With respect to joint ownership of switching and transmission facilities, the Commission's *Non-Accounting Safeguards Order* rested directly on the *Computer II* and *Competitive Carrier Orders*. *See id.* ¶¶ 148-51, 158-62; *see also Computer II*, 77 F.C.C.2d at 477-78, ¶ 240; *Competitive Carrier*, 98 F.C.C.2d at 1198, ¶ 9. Permitting common ownership of switching and transmission facilities would disavow the premise of these orders, and the burden placed upon the Commission to justify repudiating these and related cornerstones of regulatory policy would be correspondingly enormous. In fact, that burden would be impossible to meet on any ground that the RBOCs have suggested, relating to integration efficiencies or otherwise. *See Third Order On Reconsideration* ¶ 27 (separate affiliate requirements, "where a court or agency has chosen to impose them, have never allowed

[full] integration of local BOC facilities and the extra facilities necessary to provide the competitive service at issue").

C. Eliminating The Joint Ownership Prohibition Would Create Substantial Unfair Advantages For BOC Section 272 Affiliates.

Even if Congress had authorized the Commission to permit joint ownership of switching, transmission facilities, and associated land and buildings, and even if the Commission could possibly justify repudiating its consistent conception of the essential components of separation requirements, including what constitutes "independent operation," permitting such joint ownership would still be unjustified. That is because the Commission's prior determinations were clearly correct, and contrary conclusions would be equally clearly arbitrary and capricious. Permitting such joint ownership would dramatically undercut the clear purposes of section 272, including § 272(e), by creating substantial opportunities for the BOCs to misallocate costs and to discriminate in favor of their own affiliated long distance operations.

First, if the BOCs were permitted to integrate their operations by jointly owning switches, transmission and associated land and buildings, a massive and far larger pool of joint and common costs would be created that would have to be allocated through inherently arbitrary allocations. As the Commission concluded in 1996, "the costs of wired telephony networks and network premises are largely fixed and largely shared among local, access, and other services," and thus sharing of these network facilities among the BOC and its § 272 affiliates would dramatically increase the magnitude of joint and common costs and thereby provide a "significant opportunity for improper allocation of costs" that would impede long-distance competition and harm ratepayers. *Non-Accounting Safeguards Order* ¶ 159.

This result by itself defeats one of the most primary benefits of imposing a separate affiliate structure in the first place. As the Commission recognized nearly 20 years ago, one of the "principal mechanisms" by which a separate affiliate structure can reduce a dominant firm's ability to engage in cost misallocation is the simple "reduction in the extent of joint and common costs between affiliated firms" – indeed, because joint and common costs can be so easily misallocated, "[i]deally, the parent and subsidiary should have *no* joint and common costs to allocate." *Computer II*, 77 F.C.C.2d, ¶¶ 205, 237 (emphasis added). But, at a minimum, the Commission can adopt more "effective regulation" by determining the "areas where the potential for anticompetitive behavior and misallocation of cost is great[est]." *Id.* ¶ 238. And, traditionally, the Commission has always found that the operation of the network and the "joint use of physical space" are the areas that present the most dangerous potential for cost misallocation. *Id.* ¶¶ 238, 240; *see also Non-Accounting Safeguards Order* ¶¶ 158-63; *Second Non-Accounting Safeguards Reconsideration Order* ¶ 50. It correctly determined that the harms to competition resulting from such integration clearly and inherently outweighed any efficiency gains that consumers would receive. Indeed, this conclusion is compelled because, in the absence of robust and long-term competition in all relevant markets, the incumbent's market power ensures that any efficiency gains can and will be retained by the incumbent as profits rather than distributed to consumers in the form of lower prices. Accordingly, in deciding how to balance any loss in efficiency against possible harm arising from cost misallocation, the Commission has consistently determined to forbid sharing of core network facilities like switching, transmission, and the physical space where those facilities are housed. *Computer II* ¶¶ 238, 240; *Non-Accounting Safeguards Order* ¶ 159.

There is no basis today to change this longstanding rule. As explained in the attached declaration by Dr. Lee L. Selwyn, the BOCs' incentives and abilities to discriminate against rivals and to misallocate costs are stronger today than they were in 1996. Selwyn Decl.

¶¶ 11-14. Now that all BOCs have been authorized pursuant to section 271 to provide in-region, interLATA services, all of the BOCs compete in the interLATA market and thus have strong incentives to use their enduring market power over local services to harm competition in the interLATA market – which is why section 272 safeguards, along with the Commission's implementing rules and enforcement authority, are more vital now than ever before. Accordingly, this is a period in which the Commission should strengthen oversight of the BOC's entry into the long distance market – and not abandon longstanding blanket prohibitions like the ban on joint ownership and attempt to detect such misconduct through burdensome and inevitably ineffective oversight of the BOCs' cost allocation procedures.

In this regard, the BOCs will likely contend (as they did with the OI&M rules) that any concerns about cost misallocation have been eliminated by price cap regulation and, in any event, can be addressed through a straightforward application of the Commission's cost allocation rules. But because the Commission has not for decades permitted joint, vertically-integrated ownership of core network facilities like switching, transmission, and the associated land and buildings housing those facilities, applying the Commission's cost allocation principles to these facilities and to these affiliations will require difficult judgments of inherently arbitrary allocations and detailed oversight of the BOCs' costs. Selwyn Decl. ¶¶ 19, 22-23. Further, as Dr. Selwyn explains (*id.* ¶ 13) and as explained further below, price caps do not entirely eliminate incentives to misallocate costs and do nothing to address the BOCs' *abilities* to engage in such anticompetitive abuses. Accordingly, the ban on joint ownership of core network facilities remains critical to mitigate – without engaging in the "burdensome regulatory involvement that would be necessary to detect and deter such cost misallocation" (*Third Order On Reconsideration* ¶ 20) – the BOCs' abilities to harm largely captive ratepayers of local services by loading costs away from their competitive service offerings. *See* DOJ 272 Comments at 10 ((excessive "sharing would make cost misallocation possible even in a regime of extensive record keeping by the BOC and vigilant auditing by the Commission. The Commission could not practically detect any but a miniscule percentage of the occasions on which BOC personnel devoted unrecorded time to affiliate problems"); *see also* Selwyn Decl. ¶¶ 15-19 (explaining how elimination of joint ownership ban would provide BOCs with numerous undetectable means of misallocating costs).

Second, eliminating the joint ownership ban would, at a minimum, create intractable regulatory problems and would result in arrangements that inherently discriminate against rivals to the BOC's § 272 affiliates. Under the existing ban on joint ownership of switching and transmission facilities, including land and buildings, an affiliate can obtain access to the BOC's network facilities and buildings only through arm's length, publicly disclosed transactions – such as collocation arrangements – on terms and conditions and using the same procedures that, pursuant to the nondiscrimination requirements of 272(c) and 272(e), the BOC's rivals can also obtain. However, as Dr. Selwyn explains (Decl. ¶¶ 20-21), if joint ownership of these core network facilities and buildings were permitted, section 272's "nondiscrimination safeguards would offer little protection." *Non-Accounting Safeguards Order* ¶ 160. In those circumstances, "the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate." *Id.* The "consideration" for such ownership interests would simply flow from one RBOC account to another, ensuring that no bona fide arm's length arrangements exist, much less that such arrangements would be offered to competitors on like terms. Accordingly, permitting joint ownership would almost surely result in violations section 272's stringent nondiscrimination requirements.

Indeed, if BOCs and their section 272 affiliates were jointly to own switching or transmission facilities and the land and buildings housing such facilities, rivals to the section 272 affiliate could validly assert that they, too, are entitled to ownership rights to these BOC facilities. The Commission would then be required either to ensure that non-affiliated entities are provided with comparable ownership interests and associated rights or, conceivably, to replicate the advantages provided by ownership through contracts providing equivalent rights. It would be impossible to satisfy section 272(c)'s and section 272(e)'s strict and unqualified nondiscrimination requirements. By contrast, the outright ban on joint ownership of switching, transmission, and associated facilities is a far less burdensome regulatory tool, and the only one practically available to the Commission: by ensuring that the § 272 affiliate obtains network facilities from the BOC on terms and conditions that are transparent and that can be more readily adopted by rivals, the rule greatly simplifies the task of ensuring that the BOCs comply with their nondiscrimination duties.

II. THE COMMISSION SHOULD RETAIN ITS PROHIBITION ON JOINT PROVISION OF OI&M SERVICES.

In prior proceedings held in response to petitions by all four RBOCs for forbearance from the OI&M requirements, AT&T submitted significant comments and evidence showing why the OI&M rules should be retained even if the Commission could lawfully forbear from those requirements. Those comments and evidence remain applicable to the Commission's *Notice* here (*see* ¶ 5 n.17), and AT&T expressly incorporates those comments here and is submitting those comments as an attachment to these comments so that they are contained in the record in this proceeding.[10]

A. The OI&M Rules Are Necessary To Prevent Discrimination And Cost Misallocation.

As Congress has indicated and as the Commission has repeatedly found for years, the OI&M prohibition is also critical in preventing discrimination and cost misallocation.[11] In the *Non-Accounting Safeguards Order*, the Commission concluded "that allowing the same personnel to perform the operation, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the opportunity for such substantial integration of operating functions as to preclude independent operation, in violation of section 272(b)(1)." *Non-Accounting Safeguards Order* ¶ 163. Relying on a principle established in 1983 when the BOCs were first

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[10] *See* AT&T's Opposition to Verizon Petition To Forbearance (filed Sept. 9, 2002) (Exh. A hereto); Comments of AT&T [On Petition of SBC For Forbearance] (filed July 1, 2003) (Exh. B hereto); Comments of AT&T Corp. In Opposition To BellSouth's Petition For Forbearance (filed Aug. 6, 2003) (Exh. C hereto); Opposition of AT&T Corp. to Qwest Petition for Forbearance (filed Oct. 29, 2003) (Exh. D. hereto); *Ex Parte* Letter of David Lawson, counsel for AT&T, to Marlene Dortch, FCC, and Declaration of Lee L. Selwyn (filed Nov. 15, 2002) (Exhs. E & F hereto); *Ex Parte* Letter of Clinton Beckner III, counsel for AT&T, to Marlene Dortch, FCC, and Declaration of Lee L. Selwyn (filed July 9, 2003) (Exhs. G & H hereto); *Ex Parte* Letter of Frank Simone, AT&T, to Marlene Dortch, FCC (filed Sept. 16, 2003) (Exh. I hereto); *Ex Parte* Letter of Frank Simone, AT&T, to Marlene Dortch, FCC (filed Oct. 1, 2003) (Exh. J hereto); *Ex Parte* Letter of Frank Simone, AT&T, to Marlene Dortch, FCC (filed Oct. 31, 2003) (Exh. K hereto). All filings were made in CC Docket No. 96-149.

[11] *Non-Accounting Safeguards Order* ¶ 163; *Non-Accounting Safeguards Second Order On Reconsideration* ¶ 12; *Third Order On Reconsideration* ¶ 20. For these reasons, the arguments based on the Act's language and the APA, set forth above with respect to joint ownership of facilities (*supra* pp. 10-17), apply with at least equal force to the prohibition on common operating, installation, and maintenance services. Indeed, Congress' intent on this point is especially clear. It is impossible to have the BOC affiliate "operate independently" when it is not independently undertaking "operating" services. That is, eliminating the rule would ensure that the affiliate's "operations" are dependent on the BOC, not independent as § 272(b)(1) commands.

created, the Commission stressed that section 272(b)(1)'s "operate independently" requirement barred such sharing of OI&M services, in part because such shared service arrangements "would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors," and "would create substantial opportunities for improper cost allocation." *Id.* (citing *BOC Separations Order*). The OI&M prohibition is therefore a vital tool to fulfill section 272's central purpose of "prohibit[ing] anticompetitive discrimination and cost-shifting." *Id.* ¶ 9.

AT&T previous submissions detailed how the OI&M safeguards help ensure that BOCs do not engage in anticompetitive abuses.[12] The BOCs nevertheless have claimed that the safeguards are unnecessary because of other regulations, particularly price caps and the Commission's cost allocation rules. These arguments simply do not withstand scrutiny.

a. Price Caps. As an initial matter, the Commission has already rejected the BOCs' claims that price caps are sufficient to prevent cost misallocation. When price caps were first applied to the LECs in 1990, for example, the Commission retained its cost allocation rules.[13] Then, in 1996, after passage of the Act and § 272, the Commission re-affirmed, in the same orders that promulgated the OI&M rules and other rules implementing Section 272, that that "interstate price cap regulation does *not* eliminate the need for cost allocation rules."[14] By the same token, the prohibition on OI&M remains necessary even with the existence of price

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[12] *See, e.g.*, AT&T July 9, 2003 *Ex Parte* Letter, at 8-9 and Selwyn Decl., ¶¶ 9-21 (Exhs. G & H); AT&T Opp. to Verizon Pet., at 7-12 & Selwyn Reply Decl., ¶¶ 21-24, 30-34 (filed Sept. 9, 2002) (Exh. A).

[13] *In the Matter of Policy and Rules Concerning Rates For Dominant Carriers*, 5 FCC Rcd. 6786, ¶¶ 396-97 (1990).

[14] *Accounting Safeguards Under the Telecommunications Act of 1996*, 11 FCC Rcd. 17539, ¶¶ 58, 271 (1996) ("*Accounting Safeguards Order*") (emphasis added).

caps. Again in 1997, the BOCs argued to the Commission that "the trend toward pure price cap regulation" eliminates any danger of cost misallocation, and the Commission flatly rejected the claim, finding that "in enacting section 272, Congress clearly concluded that the dangers of anticompetitive conduct, and the need for structural and nonstructural safeguards, will not yet have been eliminated when the BOCs are permitted to enter the in-region long-distance business." *Second Non-Accounting Safeguards Reconsideration Order* ¶ 47 n.96. Nothing has changed in the intervening years that would support any reversal of the Commission's established view.

Indeed, the passage of the Act makes it even more clear that price caps are not sufficient to constrain all cost misallocation: if the BOCs were correct, then it is hard to imagine why Congress required a separate affiliate structure and the other § 272 safeguards at all. Price cap regulation had been in existence for several years when Congress enacted section 272, and yet Congress necessarily determined, by requiring a separate affiliate and detailed transactional safeguards, that they were not by themselves sufficient to limit the BOCs' ability to misallocate costs. That is because price caps are designed only to reduce the LECs' *incentive* to misallocate costs, but because price caps alone could never entirely eliminate these incentives, additional rules and safeguards, such as the OI&M rules, are necessary to limit the incumbent LECs' *ability* to misallocate costs to the detriment of captive ratepayers and competitors.

Thus, contrary to the BOC's claims, price cap regulation has *not* eliminated the incumbents' incentives to misallocate costs to their monopoly services. Indeed, the most the BOCs have ever claimed is that price cap regulation has "largely" alleviated the link (or has eliminated all "direct" links) between costs and rates. But that admits that numerous links between costs and prices are still in place, and therefore leave plenty of reasons why incumbents continue to have the incentive to inflate the costs of their regulated services and understate the costs of services that face some measure of competition. As Dr. Selwyn describes, *see* Selwyn Decl. ¶ 13, this is because, in practice, price cap regulation is effectively only a modified form of rate-of-return regulation. The "index" used to adjust rates is always subject to change by the regulator, and the typical basis for altering the index is that a company's costs have increased at a greater rate than the index. *See* Kenneth Train, *Optimal Regulation* 327 (1991) (under price cap regulation, a firm will have incentive to "waste so as to convince the regulator to allow a higher cap"). For that reason, as the Supreme Court held in 2002, "price caps do not eliminate gamesmanship," primarily because price caps are "simply . . . a rate-based offset" that, like rate-of-return regulation, still provides "monopolies too great an advantage." *Verizon*, 535 U.S. at 487-88. And this is no theoretical concern: because the CALLS plan is due to expire soon, the incumbents have powerful incentives to shift costs in order to support higher exchange access price caps going forward.[15]

In all events, even if "perfect" price cap regulation did mitigate the concerns associated with anticompetitive abuses of bottleneck market power, the incumbent LECs are not even subject to "perfect" price cap regulation and therefore retain strong incentives to pad costs of regulated services. First, a number of states continue rate of return regulation for intrastate services, and in those areas there is a direct link between the incumbents' costs and prices – and thus the tremendous incentive for incumbents to inflate the rate base. Further, even in states that

[15] The BOCs attempt to dismiss these concerns as mere "speculation," but the danger that dominant local carriers pose to competition in long distance is no mere theory – it is the "fundamental postulate of U.S. telecommunications law" and neither the BOCs nor the Commission may casually dismiss these risks or merely assume that other regulation will suffice to address anticompetitive abuses. As the Commission has previously explained, "decades of experimentation" have demonstrated that regulation alone "could not fully monitor and control such exclusionary and discriminatory behavior" and that "structural solutions . . . were vitally necessary." *SBC/Ameritech Merger Order* ¶ 14.

have adopted price caps for intrastate services, many such state price cap systems have retained sharing or other periodic earnings reviews, which likewise create a direct link from the costs incurred to the rate increases.

In addition, even though the interstate price cap system no longer includes a sharing obligation, incumbent LECs would nonetheless obtain significant benefits by virtue of the fact that they could, in the absence of OI&M rules and other safeguards, misallocate costs to their regulated services. As described above, by manipulating its affiliates' costs to artificially low levels, an incumbent can effect price squeezes on its rivals even as it appears to comply with imputation requirements. Further, if incumbent LECs could shift a disproportionate share of the massive joint and common costs away from competitive services and onto regulated local services, they could be able to boost substantially prices for essential services, such as unbundled network elements, that they provide to downstream rivals.[16] For these reasons, even if "perfect" price cap regulation currently existed, price caps are not, by themselves, sufficient to eliminate incentives to misallocate costs.

b. Cost Allocation Rules. It is also not true, as the BOCs have contended, that the "substantial opportunities for cost misallocation" that would exist if joint OI&M were permitted can be addressed by a simple and straightforward application of the Commission's cost allocation rules. As with the joint ownership prohibition, the OI&M rules address the inherently arbitrary allocation of joint and common costs directly, by reducing the magnitude of joint and common costs. The Commission's determination to create an outright ban on OI&M, rather than

[16] To be sure, Congress has prohibited the prices for network elements to be based on historical costs, *see* 47 U.S.C. § 252(d)(1), and the Commission has adopted TELRIC pricing rules that examine the costs incurred by an efficient carrier, but that has not prevented the incumbent LECs from advancing cost models and UNE prices that are purportedly consistent with the Act and those rules but that in fact are rife with backward-looking data based on the incumbents' actual costs.

attempt to police cost misallocation through cost allocation rules or in other ways is, in fact, *less* intrusive than the alternative. The Commission has recognized since at least 1983 that "sharing of such services would require 'excessive, costly, and burdensome regulatory involvement in the operation, plans, and day-to-day activities of the carrier [in order] to audit and monitor the accounting plans necessary for such sharing to take place.'" *Non-Accounting Safeguards Order* ¶ 163 (quoting *BOC Separations Order*, 95 F.C.C.2d at 1144, ¶ 70). Rather than attempt to engage in such oversight, the Commission properly determined to ban joint OI&M altogether. *See also Non-Accounting Safeguards Third Order On Reconsideration*, ¶ 20 (recognizing "the burdensome regulatory involvement that would be necessary to detect and deter such cost misallocation").

Accordingly, if the Commission were to eliminate the OI&M rules, then it will need to devote far more resources than it currently does to enforce its cost allocation rules and to ensure that the BOCs follow those rules and thereby operate truly independent § 272 affiliates. To date, however, even though the Commission has again and again trumpeted the importance of the section 272 safeguards to competition and to consumers, it has rarely shown any serious interest in prompt and rigorous enforcement of section 272 requirements. As AT&T has previously explained, the Commission has failed to use the Congressionally-provided audit tool as it has promised. And nothing in the Commission's *Notice* even hints that it plans to invigorate its enforcement against the BOCs to address the substantial opportunities for cost misallocation and discrimination that would occur if the BOCs and § 272 affiliates could provide OI&M services to each other.

B. The BOCs Have Never Shown That Costs To Comply With OI&M Safeguards Are High Or Impose Competitive Handicaps.

The *Notice* claims that the "Verizon demonstrated that significant operational costs could be saved if it could use BOC employees rather than contract workers to perform the section 272 affiliate's OI&M work," and it requests additional evidence "assessing the quantification of cost savings." *Notice* ¶ 8.[17] But as AT&T has previously shown, neither Verizon nor any other BOC ever in fact demonstrated that the OI&M restriction imposes significant costs – indeed, Qwest flatly admitted that it had not yet incurred any costs as a result of the OI&M rules and BellSouth's submission show that the costs are minimal relative to revenues.[18] And no BOC showed, using "actual marketplace evidence," that the OI&M restriction either hindered the BOCs' ability to provide competing long distance services or did not establish, as § 272 was designed to do, a level playing field among the BOC affiliates and their long distance rivals. *See Texas 271 Order* ¶ 395. To the contrary, the evidence shows that the BOCs have been extraordinarily successful in the long distance market even with the OI&M rules – demonstrating that, if anything, the Commission has implemented (or, more accurately,

[17] As AT&T has explained, Verizon in fact "demonstrated" nothing of the sort, and to the extent the *Notice* reaches a conclusion on this point (as opposed to merely summarizing Verizon's claims), it is unsupported by the record and contradicted by AT&T's showing that, among other flaws, Verizon's claims are based on the improper view that the BOC would be charging an improper prices for those services. *See, e.g.*, Selwyn Decl. ¶¶ 29-32; AT&T Oct. 1 2003 *Ex Parte*, at 4-5 (Exh. J); AT&T Oct. 31 2003 *Ex Parte*, at 3-4 (Exh. K).

[18] *See, e.g.*, Opp. Of AT&T Corp. to Qwest Pet., at 2 (noting Qwest admission that it "incurs very few OI&M costs") (Exh. D); *Ex Parte* Letter of Mary Henze, Bell South, to Marlene Dortch, FCC, CC Docket No. 96-149 (Sept. 15, 2003) (estimating that BellSouth pays $3.3 million annually for OI&M expense); AT&T July 9, 2003 *Ex Parte*, at 3-5 & Selwyn Decl., ¶¶ 3-22 (Exhs. G & H); AT&T Oct. 1, 2003 *Ex Parte*, at 2-6, 8-9 (Exh. J).

refused to implement) § 272 in a manner that tilts the playing field far in the BOCs direction.[19] Accordingly, even if the BOCs' costs of compliance were relevant, nothing in the record establishes that those costs outweigh the benefits of the OI&M rules and the protections provided to competition and to ratepayers.

But more fundamentally, the *Notice*, by inquiring into the costs and benefits of the OI&M rules, asks the wrong question, because, as with the joint ownership rules, Congress has already made the cost-benefit analysis in § 272 and determined that BOCs must offer long distance services through separate affiliates that operate on a truly independent basis. Thus, section 272 is not aimed at creating the most efficient, cost-effective way for BOCs to provide in-region and interLATA services. *See*, *e.g.*, *Non-Accounting Safeguards Order* ¶¶ 153, 163 (rejecting BOCs' claim that OI&M restriction is inappropriate because it will "result in a loss of efficiency and economies of scale, decrease innovation, and fewer new services"). Rather, its purpose is to ensure that competition (including long distance competition) remains healthy during the time period when the BOCs have section 271 approval but also continue to dominate local markets.

C. The Commission May Not Avoid Limitation On Its Forbearance Authority By Adopting Unreasonable Constructions Of The Act's Provisions.

In its recent order rejecting Verizon's petition for forbearance, the Commission properly determined that § 10(d) denied it the authority to forbear from the OI&M requirements. Order, *Petition of Verizon for Forbearance*, CC Docket No. 96-149 (rel. Nov. 4, 2003). The OI&M rules are "requirements" of section 271, which incorporates all of the requirements of § 272, including the Commission's implementing rules. *Id.* Having just concluded that it lacks

[19] *See, e.g.*, AT&T Oct. 1 2003 *Ex Parte* at 2; AT&T Opp. to Verizon Pet., at 14 & Selwyn Reply Decl., ¶¶ 6-8 (filed Sept. 9, 2002) (Exh. A); G. Witte, *An Evolutionary Edge*, WASH. POST, at E1 (Dec. 3, 2003).

authority to forbear from the OI&M requirements, it would unlawfully "circumvent[] the statutory scheme" for the Commission to eliminate those requirements in this rulemaking proceeding. *See ASCENT*, 235 F.3d at 666. As the D.C. Circuit held in *ASCENT*, even if the Commission does "not explicitly invoke[] forbearance authority," the Commission acts unlawfully where it unreasonably interprets the Act's provisions in order to reach "the very result it had previously rejected." *Id*.

In *ASCENT*, the Commission purported to excuse a separate affiliate created by SBC to provide advanced services from the obligations of 251(c), on the grounds that the affiliate was not a "successor or assign" to SBC and thus was excluded from the scope of § 251(c). The Commission conceded that § 10(d) prohibited it from forbearing from applying the § 251(c) requirements (since they had not been fully implemented), but claimed that it was not in fact forbearing and was merely interpreting the Act so as to exclude SBC's affiliate from being deemed a successor or assign to SBC. The Court vacated the Commission's finding, holding that the Commission acted unreasonably by interpreting the Act in a manner that sidestep the limits on its forbearance authority. *Id.* at 666, 668. The same is true here: the Commission has concluded that it is legally prohibited by section 10(d) to forbear from applying the OI&M requirements. It cannot circumvent the limits on its authority by adopting interpretations of the Act (here, § 272(b)(1)) to obtain "the very result it had previously rejected." *Id.* at 666. Accordingly, the Commission would violate the Act if it eliminated the OI&M rules before they sunset (along with the other § 272 requirements) pursuant to § 272(f) or Commission decision or before the requirements of 251(c) and 271 are fully implemented.

III. THE COMMISSION WOULD VIOLATE THE ACT IF IT ELIMINATED ALL OF ITS RULES IMPLEMENTING THE OPERATE INDEPENDENTLY MANDATE.

Even apart from the substantial legal and policy reasons that require a separate, operationally independent affiliate to own, operate, install and maintain its own network facilities, the Commission's proposal to eliminate *all* of its implementing regulations of section 272(b)(1)'s "operate independently" requirement clearly is a non-starter. The Commission determined in 1996 that "the 'operate independently' requirement of section 272(b)(1) imposes requirements *beyond* those listed in section 272(b)(2)-(5)."[20] This reading is compelled by the structure of section 272 and the requirement that statutes must be construed to give effect to each of its provisions.[21] Section 272(b)(1) contains an exceptionally broad mandate that the § 272 affiliate "operate independently" from the BOC and the remaining subsections of § 272(b) specify particular "structural and transactional" methods that the affiliate must obey. Accordingly, if section 272(b)(1)'s operate independently requirement is to have meaning, it must impose additional obligations beyond those established in subsections 272(b)(2)-(5). Thus, while the Commission should, as explained above, retain all of its rules prohibiting joint ownership of switching and transmission and barring joint OI&M services, it would unquestionably violate the Act to eliminate all of its existing rules under section 272(b)(1).

[20] *Non-Accounting Safeguards Order* ¶ 156 (emphasis added); *see also* Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards*, 11 FCC Rcd. 18877, ¶ 57 (1996).

[21] *See, e.g.*, *AT&T Corp.* v. *FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002) (reversing FCC interpretation of § 201 of the Act that rendered part of that section "meaningless"); *CF Communications,* 128 F.3d at 739 (same).

CONCLUSION

For the foregoing reasons, the Commission should retain its current rules implementing section 272(b)(1)'s "operate independently" requirement.

Respectfully submitted,

/s/ Leonard J. Cali

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December 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 2003, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: December 10, 2003
Washington, D.C.

/s/ Peter M. Andros

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates	**WC Docket No. 03-228**

Declaration

of

LEE L. SELWYN

on behalf of

AT&T Corp.

December 10, 2003

TABLE OF CONTENTS

DECLARATION OF LEE L. SELWYN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates	**WC Docket No. 03-228**

DECLARATION OF LEE L. SELWYN

Qualifications and Assignment

Lee L. Selwyn, of lawful age, declares and says as follows:

1. My name is Lee L. Selwyn; I am President of Economics and Technology, Inc. ("ETI"), Two Center Plaza, Suite 400, Boston, Massachusetts 02108. ETI is a research and consulting firm specializing in telecommunications and public utility regulation and public policy. My Statement of Qualifications is annexed hereto as Attachment 1 and is made a part hereof. I have been asked by AT&T to review the *Notice of Proposed Rulemaking* ("NPRM" or "Notice") issued by the Commission in the above-captioned proceeding, to analyze the issues and questions raised therein, and to provide the Commission with specific recommendations thereon.

2. I have participated in proceedings before the Federal Communications Commission ("FCC" or "Commission") dating back to 1967 and have appeared as an expert witness in hundreds of state proceedings before more than forty state public utility commissions. I have participated in numerous regulatory proceedings involving public utility affiliate relationships and inter-affiliate transactions and transfers. These have included merger proceedings before the California PUC involving Pacific Telesis Group and SBC, and Bell Atlantic and GTE, before the Illinois Commerce Commission involving SBC and Ameritech, before the Connecticut Department of Public Utility Control involving SBC and SNET, and before the Maine PUC involving NYNEX and Bell Atlantic. I also participated in written comments filed with the FCC regarding both the SBC/Ameritech and Bell Atlantic/GTE merger applications. I have participated in a number of Section 271 proceedings, including those in Pennsylvania, New Jersey, California, Minnesota, Delaware and Virginia. I have also submitted testimony before several state commissions addressing proposals for structural separation of ILEC wholesale and retail operations. I participated in proceedings before the California PUC involving Pacific Bell's reorganization of its Information Services (primarily voice mail) business into a separate subsidiary, and the spin-off of Pacific Telesis Group's wireless services business into a separate company. I have participated in a number of matters involving the treatment of transfers of yellow pages publishing from the ILEC to a separate directory publishing affiliate, including the recent case before the Washington Utilities and Transportation Commission addressing imputation of (then) US WEST yellow pages revenues.

3. I have participated in proceedings related to issues raised by the instant NPRM. I submitted declarations on behalf of AT&T in the Section 272 Sunset proceedings, and several *ex parte* declarations and presentations in the Verizon OI&M Forbearance proceeding.[1] As the Commission notes in its NPRM, the discrimination and cost issues raised in those proceedings similar to those in the *Verizon OI&M Forbearance Proceeding*, and other petitions for forbearance filed by other BOCs. I understand that AT&T will be submitting my prior declarations into the record in this proceeding.

Summary

4. It has long been understood both by Congress and the FCC that where an ILEC is engaged in the provision of regulated monopoly and nonregulated competitive services, it has a powerful incentive to pursue strategies that work to advance its competitive operations to the disadvantage of its regulated monopoly services. This can be accomplished through outright discrimination in the provisioning of essential services, favoring the ILEC's competitive operations (whether provided on an integrated basis or through a separate affiliate) to the detriment of

1. *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Reply Declaration of Dr. Lee L. Selwyn on behalf of AT&T, August 26, 2002, ("*Selwyn Sunset Reply Declaration*") subsequently filed in *Petition for Forbearance From The Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) Of The Commission's Rules*, CC Docket No. 96-149, ("*Verizon OI&M Forbearance Proceeding*") attached to the Comments of AT&T, September 9, 2002. I have also participated in the preparation of ex parte presentations in the *Verizon OI&M Forbearance Proceeding*, filed November 15, 2002; July 9, 2003; July 29, 2003; September 9, 2003; September 16, 2003.

competitors, and/or through an overallocation of joint costs to monopoly services, in effect forcing the ILEC's monopoly services to cross-subsidize its competitive line of business.

5. In 1996, the Commission determined that these dangers of anticompetitive abuses were especially significant in two areas. First, discrimination and cost misallocation were very likely if the BOC and its separate long distance affiliate created pursuant to Section 272 were permitted to perform operating, installation, and maintenance ("OI&M") services on each other's facilities. Second, the BOCs and the Section 272 affiliate would likely misallocate costs and discriminate against rivals if they were permitted to jointly own switching and transmission facilities, as well as the land and buildings housing those facilities.

6. The Commission is now considering whether to eliminate these rules. Because the risk of anticompetitive abuses is just as strong today as it was in 1996, the Commission should retain its rules and continue to require OI&M and facilities ownership separation. In this declaration, I explain several ways in which the BOCs' ability to misallocate costs and to discriminate will be significantly enhanced if the rules are not retained.

7. First, joint ownership of switching and transmission facilities, currently forbidden by the *Non-Accounting Safeguards Order*, would allow a BOC to simply ignore many of the statutory requirements of Section 272. To the extent that a switching or transmission facility is jointly owned by a BOC and its affiliate, the Section 272 affiliate would not be required to contract with the BOC for those services. There would be no terms, conditions or rates that could be compared

to the terms, conditions or rates available to competing carriers. In addition, joint ownership of the land upon which switching and transmission facilities are located would serve to both decrease competitor access to collocation space and ensure that the Section 272 affiliate obtains preferential access to space in a BOC central office.

8. Second, the difficulties that have been encountered by the Commission and affected parties in detecting — let alone remedying — misallocation of operating costs incurred for the joint benefit of the BOC ILEC and Section 272 affiliate will be compounded exponentially if the two entities are allowed to jointly own and utilize equipment and facilities in common. Part 64 of the Commission's Rules provides some guidance as to how the costs of plant used to provide both regulated and nonregulated services are to be allocated between these two categories. However, Part 64 is inadequate to ensure that the costs of a facility are appropriately allocated between regulated and nonregulated uses. Were the BOC and its affiliate allowed to engage in joint ownership, a BOC could acquire new plant solely or primarily for the purpose of supporting the competitive (nonregulated) service while managing to assign and to recover a portion thereof (perhaps even most) from regulated basic monopoly services. Such misallocations would be, for all practical purposes, largely undetectable and, in all probability, non-auditable as well.

9. Third, if OI&M integration is permitted and the BOC ILECs are allowed to provide OI&M services to their Section 272 affiliates, they will be able to misallocate costs by taking advantage of an important loophole in the Commission's rules. Specifically, Verizon has stated that it will charge its Section 272 affiliate for such services using the "prevailing company price"

method.[2] The use of so-called "prevailing company price" assumes (improperly in this case) that whatever internal transfer price is being charged by the Verizon BOC for OI&M services represents the fair market value "arm's length" price that is contemplated by Section 272(b)(5). However, the true market value of these services is the price that Verizon and other BOCs would be required to pay to nonaffiliated providers for these services, or the costs that they would incur if the OI&M functions were undertaken internally on a stand-alone basis. If the Commission eliminates its ban on joint OI&M, Verizon and the other BOCs will be able to misallocate OI&M costs by setting the transfer price at "prevailing company price" below that level, rather than at the actual market value *to the Section 272 affiliate* of the OI&M services.

10. Finally, nothing regarding Section 272(b)(1) has changed since the Commission first applied the operations, installation, and maintenance and joint ownership rules in 1996. The BOCs still have significant incentives and ability to cost-shift and discriminate against rivals through jointly provided services and joint ownership of facilities. The current rules successfully mitigate the effect of these incentives by removing OI&M services from available joint services, and by banning joint ownership of switching and transmission facilities. No alternative competitive safeguards will be wholly effective in preventing the BOCs from engaging in anticompetitive and discriminatory conduct.

2. *Verizon OI&M Forbearance Proceeding*, Ex Parte filing of Verizon, August 11, 2003, at 4.

The BOCs' strong incentive to discriminate against rivals in the long distance market through cost misallocation and discrimination — a concern that formed the basis for the OI&M separation requirement and the joint ownership prohibition — has not changed since 1996.

11. In the instant NPRM, the Commission seeks comment as to whether the elimination of the prohibition on joint ownership of equipment and facilities and on the sharing of OI&M functions reduces the BOCs' incentive or ability to discriminate against unaffiliated rivals in the long distance market. By engaging in cost misallocation and by pursuing such discriminatory tactics with respect to the provisioning of essential network services to rival carriers, the BOCs gain significant competitive advantage. As the Commission concluded in 1996, sharing of OI&M functions would "create the opportunity for such substantial integration of operating functions so as to preclude independent operation ... and would inevitably afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors."[3] The Commission reached a similar conclusion with respect to joint ownership of switching and transmission facilities.

12. The intervening years have not changed the fact that, without substantial new regulations and burdensome regulatory oversight, the BOCs continue to derive enormous competitive benefit from cost misallocation and discriminatory practices. As I have previously noted on several occasions in testimony submitted before the Commission, the BOCs maintain a virtual

3. *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21984, at para 163 (1996) ("*Non-Accounting Safeguards Order*").

monopoly with respect to basic local residential exchange service, and control the facilities necessary for CLEC provision of mass market residential and small business services as well as "enterprise" services furnished to larger business customers.[4] Insofar as the BOCs' captive local customer base confronts significantly less competition than exists in the long distance market, the BOCs have powerful financial and competitive incentives to shift costs from competitive long distance over to monopoly local services, access services, and UNEs.

13. Incentives to misallocate costs have not been mitigated by price caps.[5] Although the BOCs have often argued that price cap plans remove the incentives to engage in cost-shifting, the reality of state price cap plans (recently recognized by state regulators participating in the Federal-State Joint Conference on Accounting Issues[6] ("Joint Conference") belie such claims. BOCs frequently ask for and receive adjustments to their price caps based upon cost and revenue data, and the ability to inflate costs or depress revenues is essential to the appearance of fiscal

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4. *Selwyn Sunset Reply Declaration,* at paras. 14-18; *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175 ("*Dominant/Nondominant Proceeding*"), Declaration of Lee L. Selwyn on behalf of AT&T, June 30, 2003 ("*Selwyn Dominant/Nondominant Declaration*"), at p. 7-22.

5. A more in-depth discussion of the effect of changes in state price cap plans and CALLS on the BOC's ongoing incentive to misallocate costs can be found in *Selwyn Dominant/Nondominant Declaration*, at p. 93-98; *Dominant/Nondominant Proceeding,* Reply Declaration of Lee L. Selwyn on behalf of AT&T, July 28, 2003, at paras. 6, 57, 58, 65.

6. *Federal-State Joint Conference on Accounting Issues*, WC Docket 02-269, *Letter from the Joint Conference to the Commission*, October 9, 2003.

necessity. This reality was recently recognized by Commissioners Martin and Copps, as well as by numerous state regulators, as demonstrated by the Letter transmitting the recommendations of the Joint Conference:

> By under-pricing services or assets, the ILEC would be absorbing some of the cost and thereby lowering the affiliates's overall cost structure, to the overall benefit of the ILEC's holding company. Additionally, ILECs could use this new discretion to offset higher-than-desired earnings at the regulated entity. This would be an advantageous strategy whenever an ILEC believes it would benefit from making its regulated earnings appear as low as possible, such as when it is pursuing a takings claim, seeking regulatory relief based on allegedly depressed earnings, or is subject to a profit-sharing requirement.[7]

14. There has been no change in the BOCs' incentives to misallocate costs or discriminate against IXC competitors since the 1996 *Non-Accounting Safeguards Order*. The conclusions drawn in the *Non-Accounting Safeguards Order* and the *Accounting Safeguards Order* in 1996 are the same conclusions drawn by the US Supreme Court and the Joint Conference in 2003.[8] As a result, the Commission must consider the effect of any prospective OI&M and joint ownership rule changes upon:

(1) the *ability* of the BOCs to engage in cost-shifting; and

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7. *Id.*, at 24.

8. The U.S. Supreme Court noted that, "price caps do not eliminate gamesmanship." *Verizon v. FCC*, 535 U.S. at 512.

(2) the effectiveness of the new safeguards the Commission implements to replace the OI&M and joint ownership restrictions.

Joint ownership of OI&M facilities provides BOCs with numerous undetectable means of misallocating costs and discriminating against rivals.

15. The difficulties that have been encountered by the Commission and affected parties in detecting — let alone remedying — misallocation of operating costs incurred for the joint benefit of the BOC ILEC and Section 272 affiliate will be compounded exponentially if the two entities are allowed to jointly own and utilize equipment and facilities in common. The critical question is how will the costs of jointly-owned facilities be allocated between the BOC ILEC and the Section 272 affiliate? One response, proposed by longtime BOC advocate Prof. Alfred Kahn, would in effect give the affiliate a "free ride" on all jointly-used facilities, assigning to it only the *additional* costs attributable to the affiliate's use that would not exist if the facilities were owned and utilized solely by the ILEC. According to Kahn, "[t]he way to achieve the complete transfer of risk from purchasers of existing telephone services to the companies themselves is by a rule that completely removes from the costs on the basis of which the rates for those services are set *all the costs additionally imposed on the company by its undertaking to put itself in a position to offer new services*."[9] The "free ride," of course, is wholly at odds with the Section 272(b)(5) "arm's length" requirement, since it's difficult to imagine any situation in which a company

9. Alfred Kahn, *How to Treat the Costs of Shared Voice and Video Networks in a Post-Regulatory Age*, Policy Analysis, No. 264 (Nov. 27, 1996) at 6, emphasis supplied.

would give an unrelated firm a "free ride" with respect to the latter's use of the former's facilities and services.

16. Part 64 of the Commission's Rules provides some guidance as to how the costs of plant used to provide both regulated and nonregulated services are to be allocated between these two categories. However, Part 64 provides for something roughly akin to fully distributed cost, which gives little or no effect to the *purpose* for which specific costs have been incurred, and clearly does not embrace or reflect the "arm's length" requirement of Section 272(b)(5):

> 47 CFR §64.901(b)(4): The allocation of central office equipment and outside plant investment costs between regulated and nonregulated activities shall be based upon the relative regulated and nonregulated usage of the investment during the calendar year when nonregulated usage is greatest in comparison to regulated usage during the three calendar years beginning with the calendar year during which the investment usage forecast is filed.

What this allocation concept ignores is the *purpose* for which the equipment or facilities were acquired — i.e., the extent to which the plant acquisition decision was driven by regulated vs. nonregulated services. Additionally, by limiting the relative use measure to "the three calendar years beginning with the calendar year during which the investment usage forecast is filed," the resulting allocation is almost guaranteed to overassign costs to the core regulated service and underassign costs to the nonregulated category.

17. Suppose, for example, that there are 10,000 subscriber loops in a particular community all being served entirely by copper feeder and distribution plant, and that all of these are being

used solely to provide regulated Plain Old Telephone Service ("POTS"). Now, suppose that the ILEC decides to replace the copper feeder and distribution facilities with fiber at a cost of $10-million (i.e., $1,000 per subscriber) so as to be able to offer DS-3 broadband service to each home, a service which, for purposes of this example, we can assume will be nonregulated. No plant replacement would be required simply to continue offering only POTS, so in that sense the *entirety* of the $10-million capital outlay is being driven by the nonregulated broadband service. However, once the fiber is in place and the $10-million has been expended, all services to the community — *POTS and broadband* — will be provided over the fiber. Now, suppose that only 5% of the households being served by this new fiber distribution plant initially order the broad-band service, and that an additional 5% order broadband each year for a total of ten years, at which time 50% of the customers will be taking broadband. §64.901(b)(4) only requires that relative usage over a three-year time frame be used to apportion the costs of this facility. At the end of the first three years, 15% of the new facilities will be used to provide broadband services (i.e., a gain of 5% per year for each of the first three years); hence, when the new facilities first go into service, at least 85% of the cost will be assigned to POTS because, after the first three years, only 15% of the households will be ordering broadband. Even with respect to the 15% of households that subscribe to broadband, some portion of the cost will also be assigned to POTS, since those same customers will presumably also be taking POTS from the ILEC. If we assume that the cost is allocated 50/50 between POTS and broadband for the 15% of the households that take both, then fully 92.5% of the $10-million investment cost will be assigned to POTS, leaving only 7.5% assigned to the nonregulated broadband service. During the successive years of the 10-year ramp-up, additional shares of the joint cost of this common plant will be assigned to nonregulated service, but until the assignment is made, all other investment-related costs — depreciation, cost of money, maintenance, etc. — will remain in the regulated service category. Of course, since the *entirety* of the $10-million investment was driven by broadband, *any* assignment of *any* portion of that capital outlay to POTS operates to force POTS customers to cross-subsidize the BOC's broadband deployment.

18. Dr. Kahn's "free ride" approach may be somewhat better than the allocation contemplated by §64.901(b)(4), since (presumably) the entire $10-million investment (and associated depreciation, cost of money, maintenance and other costs) would be considered an "*additional cost*" of the nonregulated broadband service and thus be assigned to that category. However, that would still leave 100% of all other joint costs, such as supporting structures (poles and conduit), assigned to regulated basic service, since the new fiber optic cables could be accommodated without any additional structure cost. Yet in an arm's length transaction, the (theoretically unaffiliated) nonregulated service provider would obviously be charged for the use of those facilities as well, even if the ILEC incurred no additional costs to provide for such additional use.

19. It does not take significant imagination to see how joint ownership would enable a BOC to acquire new plant solely or primarily for the purpose of supporting the competitive (non-regulated) service while managing to assign and to recover a portion thereof (perhaps even most) from regulated basic monopoly services. Such misallocations would be, for all practical purposes, largely undetectable and, in all probability, unauditable as well, unless the Commission is prepared to involve itself in reviewing the "business case" underlying each individual plant

acquisition decision. If the *effect* of joint ownership of facilities is to shift costs to regulated services and/or to permit nonregulated services to use jointly-owned facilities without paying their fair share (based upon fair market value), the result is a *de facto* cross-subsidy of the BOC's competitive operations by its regulated monopoly services. And that is expressly and unambiguously prohibited by 47 CFR §64.901(c): "A telecommunications carrier may not use services that are not competitive to subsidize services subject to competition."

Joint facilities ownership will render ineffective numerous Section 272 safeguards that cannot be replaced.

20. In addition to raising cost allocation problems, joint ownership of switching and transmission equipment would make the enforcement of other requirements of Section 272 impossible. Sections 272(c)(1) and (e) require a Section 272 affiliate to obtain services and facilities on the same rates, terms, and conditions available to unaffiliated entities, and the Commission has noted that:

> [these] nondiscrimination safeguards would offer little protection if a BOC and its section 272 affiliate were permitted to own transmission and switching facilities jointly. To the extent that a section 272 affiliate jointly owned transmission and switching facilities with a BOC, the affiliate would not have to contract with the BOC to obtain such facilities, thereby precluding a comparison of the terms of transactions between a BOC and a section 272 affiliate with the terms of transactions between a BOC and a competitor of the section 272 affiliate. Together, the prohibition on joint ownership of facilities and the nondiscrimination requirements should ensure that competitors can obtain access to transmission and switching facilities equivalent to that which section 272 affiliates receive.[10]

10. *Non-Accounting Safeguards Order*, 14 FCC Rcd 21983.

21. Likewise, it would be impossible for jointly owned facilities to satisfy the nondiscrimination requirements. The *Non-Accounting Safeguards Order* specifically cited the potential effect of joint ownership on discriminatory access to facilities:

> Moreover, the ban on joint ownership of facilities should protect local exchange competitors that request physical collocation by ensuring that a BOC's section 272 affiliate does not obtain preferential access to the limited available space in the BOC's central office.[11]

If, for example, a portion of the strands in a fiber optic cable are owned by the 272 affiliate and the rest by the BOC, the Section 272 affiliate would have its own "back door" access to the BOC''s central office, and would not need to obtain a dark fiber UNE. Where a competitor requires the same access, it would be required to lease dark fiber from the BOC at tariff prices, assuming that the BOC had dark fiber capacity available. The 272 affiliate would have what amounted to outright ownership of what would normally be considered a BOC's dark fiber. Given these inconsistent requirements of Section 272 and joint ownership, there are no potential safeguards other than maintaining the outright ban on joint ownership of facilities that will support the Commission's other Section 272 requirements.

11. *Id*. (footnotes omitted).

Without extensive regulatory controls, current BOC plans for sharing of OI&M services would result in significant cost-shifting from competitive to monopoly services.

22. Recognizing the incentives outlined above, the Commission's 1996 solution to forestall cost-shifting was to preclude joint OI&M services and joint ownership of switching and transmission. The Commission determined that:

> ... allowing the sharing of such services would require "excessive, costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier ... to audit and monitor the accounting plans necessary for such sharing to take place."[12]

If the Commission now wishes to remove the OI&M sharing and joint ownership restrictions, extensive regulatory involvement would become necessary to address the same concerns. Even then, extensive regulatory involvement would not be an effective substitute for structural separation, and any benefits of such extensive regulation would be outweighed by its costs.

Detailed regulatory review and more stringent enforcement of BOC-affiliate transactions pursuant to the arm's length requirement of Section 272(b)(5) would be a costly and ultimately inadequate substitute for the existing rules.

23. Section 272(b)(5) requires that the separate affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." The concept of an "arm's

12. *Non-Accounting Safeguards Order*, 11 FCC Rcd 21984, at para 163.

length" relationship implies that each of the interacting entities are acting solely in their own self-interest. *Black's Law Dictionary* defines an "arm's length transaction" as follows:

> **Arm's length transaction.** Said of a transaction negotiated by unrelated parties, each acting in his or her own self interest; the basis for a fair market value determination. A transaction in good faith in the ordinary course of business by parties with independent interests. Commonly applied in areas of taxation when there are dealings between related corporations, e.g. parent and subsidiary. Inecto, Inc. v. Higgins, D.C. N.Y., 21 F.Supp.418. The standard under which unrelated parties, each acting in his or her own best interest, would carry out a particular transaction. For example, if a corporation sells property to its sole shareholder for $10,000, in testing whether $10,000 is an "arm's length" price it must be ascertained for how much the corporation could have sold the property to a disinterested third party in a bargained transaction.[13]

This definition gives context to the FCC's subsequent Accounting rules designed to enforce this provision. As explained in the Accounting Safeguards Order:

> The rule we adopt ... requiring carriers to record all affiliate transactions that are neither tariffed nor subject to prevailing company prices at the higher of cost and estimated fair market value when the carrier is the seller or transferor, and at the lower of cost and estimated fair market value when the carrier is the buyer or transferee — appears more likely to ensure that the transactions between carriers and their nonregulated affiliates take place on an "arm's length" basis, guarding against cross-subsidization of competitive services by subscribers to regulated telecommunication services.[14]

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13. Black, Henry Campbell, *Black's Law Dictionary*, Sixth Edition, 1990, at 109.

14. *In the Matter of Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket 96-150, *Report and Order*, 11 FCC Rcd 17539, 17607, at para. 147 (1996) ("*Accounting Safeguards Order*").

24. The Section 272 requirements create a "code of conduct" governing transactions between a BOC ILEC and its Section 272 Affiliate. Any change in the requirements of Section 272(b)(1) must thus be made within the context of other safeguards that remain in effect, and with an understanding of the limitations of the current applications of those safeguards. Section 272(b)(5)'s requirement that the BOCs' Section 272 affiliates must "conduct all transactions" with the BOC on an "arm's length basis with any such transactions reduced to writing and available for public inspection" was intended to safeguard against cost misallocation and cross subsidization. In the *Non-Accounting Safeguards Order*, the Commission recognized that, while Section 272(b)(5) presented certain safeguards against cost misallocation, they would by themselves be insufficient to constrain cost misallocation in the joint provision of OI&M services.[15]

25. Considering the existing level of enforcement of Section 272(b)(5), the Commission was absolutely correct in 1996 in finding that Section 272(b)(5) would not constrain the BOCs' ability to afford preferential treatment to their long distance affiliate.[16] This past summer — i.e., *more than three years after the grant of Section 271 authority is New York* — the Commission finally released a Notice of Apparent Liability arising out of the "biennial" New York Audit proceeding.[17] The Commission identified numerous apparent violations by Verizon

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15. *See*, footnote 3, *supra*.

16. *Id*.

17. *Verizon Telephone Companies, Inc. Apparent Liability for Forfeiture*, File No. EB-03-IH-0245, NAL/Acct. No. 200332080014, FRN No. 00089884338, *Notice of Apparent Liability for Foreiture*, Rel. September 8, 2003, ("*Verizon Audit Order*").

of the requirements of Section 272, identifying specific cost misallocations amounting to, at cost, some $16-million.[18] It is not possible to determine from the New York Audit documents and the Commission's Notice of Apparent Liability if accounting corrections for these violations were ever applied. However, in any event, the $283,800 fine imposed by the Commission for these infractions represents 2% of the benefit realized by Verizon from perpetrating these violations. Rather than operate to *deter* such conduct in the future, a fine of this almost inconsequential magnitude actually sends precisely the opposite message to the BOCs, and works to reinforce their strategy of largely — or even entirely — ignoring Congressionally- and Commission-mandated limitations on inter-affiliate transactions.

26. Indeed, the cost misallocation uncovered by the Biennial Audit could have been much worse. By removing a portion of potential activities from those permitted to be shared by the BOC and its affiliate (i.e., OI&M services and joint ownership of switching and transmission), the Commission mitigated the effect of the BOC's violations of other Section 272 safeguards. If the Commission were now to allow the sharing of OI&M services and the joint ownership of network facilities, it is likely that the magnitude of joint and common costs will increase significantly. With this expansion comes the increased risk — and harm — arising from the BOCs' failure to adhere to the requirements of Section 272(b)(5) and to conduct business with their Section 272 affiliates "at arm's length."

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18. *Id.*, at paras. 8-9.

27. The New York Audit also uncovered the fact that Verizon had failed to justify its pricing methods as complying with the "arm's length" requirement under the Commission's Section 272(b)(5) rules. In explaining the application of Section 272(b)(5) by the *Accounting Safeguards Order* as it applied to Section 272 affiliates, the Commission's Accounting Safeguards Division noted that:

> The Commission specifically held that the rules regarding valuation of affiliate transactions in effect at the time, *i.e.*, fully distributed cost, *may not be consistent with the section 272(b)(5) requirements for "arm's length basis"* and that the higher of cost or market when the carrier is the seller or transferor, and the lower of cost or market when the carrier is the buyer or transferee was more likely to ensure that the transaction takes place on an arm's length basis.[19]

28. The purpose of forcing an affiliate to pay the BOC ILEC the greater of fair market value or fully distributed cost was explained by the Accounting Safeguards Division in 2001, in response to a request by BellSouth to price affiliate transactions at incremental cost:

> This rule was intended to ensure that the captive telephony ratepayer receives the most reasonably advantageous result from the transaction and does not subsidize the LEC's affiliate activities.[20]

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19. *BellSouth Telecommunications, Inc. Permanent Cost Allocation Manual Petition for Waiver of Section 32.27 of the Commission's Rules*, ASD File No. 01-46, *Order*, Rel. December 17, 2001, at fn. 9. Emphasis supplied.

20. *Id.,* at para. 2.

Thus, for a BOC to provide a service to its Section 272 affiliate, it must both be able to price the service so as to cover its costs *and* it must charge its affiliate the full fair market value of the service.

29. Verizon and other BOCs have exploited a loophole in affiliate pricing to pervert the application of Section 272(b)(5) safeguards and ensure that, contrary to Commission principles, the long distance affiliate, and not the captive local service customers, enjoy the benefit of joint service provision. According to documents filed in the Verizon OI&M forbearance proceeding, Verizon intends to price OI&M services provided to its affiliate at fully distributed cost based upon time reporters,[21] where presumably the BOC will bear the majority of the cost for the "joint" service while the Section 272 affiliate will pay only the fully distributed cost of the additional time that a technician spends on the LD portion of the problem.

30. Under this scheme, transfer prices are set with no regard for the fair market value of those services, thus working to afford the affiliate all of the benefits of joint activities while bearing little or none of the resulting joint costs. Verizon's rationale for this operative violation of Commission rules is the so-called "Prevailing Company Price" loophole. The loophole, created by the Commission in 1996, holds that because transactions between Section 272 Affiliates and the BOC ILECs are nominally "generally available" to nonaffiliated parties, the price can be *assumed* to constitute the "fair market value" of the services involved and thus

21. *Verizon OI&M Forbearance Proceeding*, Ex Parte of Verizon, August 11, 2003, at 3.

presumptively "at arm's length."[22] Of course, merely characterizing a service as being "generally available" does not in any sense assure that, *as a practical matter*, nonaffiliated — and competing — firms would actually be able — or willing (for competitive reasons) — to buy the service from the RBOC at the precise terms and conditions at which the inter-affiliate transfer takes place.

31. Verizon (and presumably the other BOCs) apparently plan to record charges for OI&M services based upon unit time reporting multiplied by fully distributed cost. Of course, "fully distributed cost" is not how a firm, acting in its own self-interest, would ordinarily set a price for a product or service that it provides to an unrelated entity. The price would instead be based upon the buyer's "willingness to pay," which would itself be driven by the price that the buyer would have to pay to acquire the equivalent product or service from a different supplier, or the cost that it would incur were it to produce the product or service internally. Rather than base the transfer price on what would result from a truly arm's length transaction between unrelated parties, "prevailing company price" in effect defines *any* transfer price that is established by the ILEC as presumptively arm's length! Such a circular result turns the concept of "arm's length" on its head, and renders completely meaningless the affiliate transaction requirements outlined in the *Accounting Safeguards Order*, as well as the Accounting Safeguards Division's Order barring BellSouth from incrementally pricing services provided by the BOC to its Section 272 affiliate. Had the Commission intended for *any* price charged by the BOC ILEC to its affiliate to be acceptable under its affiliate transaction rules, it would not have required that the ILEC price

22. *Accounting Safeguards Order*,11 FCC Rcd 17539, 17601, at para. 137.

its services at the higher of fully distributed cost or fair market value, or required that the company engage in a “good faith effort” to estimate a fair market value.

32. Properly applied, Section 272(b)(5) accounting requirements would, for any given joint OI&M activity, place the majority of the joint cost on the Section 272 affiliate. Were the Section 272 affiliate to self-provision or hire outside contractors for such work, it would incur the full stand-alone cost. It is that same “stand-alone cost” that constitutes the “fair market value” of the service being furnished by the regulated entity.

33. The fact that BOCs purport to offer to competing IXCs the same services on a “non-discriminatory basis” does not affect their ability or incentive to shift costs. First, the BOCs and their affiliates are able to craft contracts that limit the ability of competitors to qualify for the service in question. As explained in AT&T’s September 30, 2003 *ex parte* submission, BOCs regularly offer services such as billing and collection with special “discounts” applicable primarily to their affiliates.[23] Although some interLATA competitors may qualify for the Affiliate’s discounts, unless these competitors purchase significant amounts of the service, the incentive of the BOC will not be affected. Second, as the BOCs are aware, a competing IXC purchasing OI&M services from the BOC would provide the BOC with the opportunity to degrade an IXC’s interLATA service. The Commission previously recognized a BOC’s ability to discriminate in favor of its affiliates, and required that, as a condition of Section 271 authority,

23. *Verizon OI&M Forbearance Proceeding*, Ex Parte filing of AT&T Corp., September 30, 2003, at 5-6.

a BOC prove that it provides nondiscriminatory service to competing carriers (this requirements was often satisfied by a BOC's performance metrics).[24] If OI&M integration and joint ownership are now to be permitted, the Commission would need to design, establish, implement, monitor, and meticulously enforce similar performance metrics.[25]

The Section 272 affiliates do not now confront, nor have they ever faced, exorbitant OI&M costs as a result of the Section 272(b)(1) requirement.

34. Nothing regarding the BOCs' costs to implement the Operate Independently requirement of Section 272(b)(1) have changed since 1996. Although the Commission notes in the current NPRM that "based on actual experience since gaining section 271 approval, a much more developed record exists today than at the time that the OI&M restriction was adopted to demonstrate the magnitude of the inefficiencies associated with the OI&M restriction," there is

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24. In the Bell Atlantic New York Section 271 Order, the Commission found:

> In past orders we have encouraged BOCs to provide performance data in their section 271 applications to demonstrate that they are providing nondiscriminatory access to unbundled network elements to requesting carriers. We have concluded that the most probative evidence that a BOC is providing nondiscriminatory access is evidence of actual commercial usage. Performance measurements are an especially effective means of providing us with evidence of the quality and timeliness of the access provided by a BOC to requesting carriers.

Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, *Memorandum Opinion and Order*, 15 FCC Rcd 3953, 3974 (1999) at para 53.

25. It is not even clear that a permanent set of performance metrics could be created, since the attributes to be monitored may well change as new equipment and facilities are introduced.

nothing new about the cost estimates that have been provided with the BOC petitions for forbearance. As I have explained in my July 9, 2003 *ex parte* filing, Verizon's "cost savings estimates" are without basis and thus significantly exaggerate the potential "savings" from integrated operation.[26] Current estimates such as those presented by Verizon are merely dressed-up versions of the *same* type of claims that had been advanced by the BOCs during the *Non-Accounting Safeguards* proceeding. The Commission rejected such claims then, correctly recognizing that the risks to competition outweighed any credible claims of increased cost.[27] Indeed, the only real source of purported "savings" that would inure to BOC affiliates arises not from efficiencies of joint operations or ownership, *but from the ability that the BOCs would acquire to shift costs out of the affiliate and over to the regulated ILEC entity*.

35. The BOCs could not in 1996, and still cannot, substantiate their claims of the costs of complying with Section 272(b)(1). This lack of evidence has not stopped them from trying, first in the *Non-Accounting Safeguards* Proceeding, then in a *Petition for Reconsideration*, and then in the various *Petitions for Forbearance*, and now in the instant proceeding, to presenting inflated cost estimates in an attempt to remove competitive safeguards.

36. In the *Non-Accounting Safeguards* proceeding, the BOCs had claimed that OI&M requirements would result in costs of the same magnitude as the BOCs now claim here. In 1996,

26. *Verizon OI&M Forbearance Proceeding*, Ex Parte Declaration of Lee L. Selwyn on behalf of AT&T, July 9, 2003.

27. *See* fn. 3, *supra*.

the BOCs attempted to convince this Commission to allow shared OI&M based upon the "crippling" expenses of structural safeguards.[28] SBC's initial Comments in the *Non-Accounting Safeguards* proceeding, purportedly drawing upon experience in the voice messaging market, claimed that "[f]or SBC to provide the same service with full structural separation, that is no joint marketing or sharing of administrative services, would increase the voice messaging service cost by 78% and result in an uneconomic business, and the loss of this product to the mass market. The result of structural separation was a loss of efficiency and economies of scope that nonstructural safeguards afford." Subsequently, BellSouth cited this SBC cost assessment, submitting that:

> ... simply allowing a BOC affiliate to provide maintenance and installation services for the telephone company and the interLATA company will not lead to integration of services for the telephone company and the interLATA company will not lead to integration of operations. Accordingly, BellSouth agrees with those comments in the proceeding below that the imposition of additional structural separations requirements, particularly regarding installations and maintenance activities would result in a loss of efficiency and economies of scope.[29]

Despite years of opportunity, the BOCs have never substantiated these claims with anything more substantive than the undocumented speculations offered in support of the BOCs' OI&M forbearance efforts.

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28. USTA Comments (96-149) at 5.

29. *Implementation of the Non-Accounting Safeguards of Section 271 and 272 or the Communications Act of 1934, As Amended*, CC Docket 96-149, Petition for Reconsideration filed by BellSouth Corporation, February 20, 1997, at 7, citing SBC Communications Comments (filed August 15, 1996) at 13-17 and USTA Reply Comments (filed August 15, 1996) at 4.

Conclusion

37. The Commission has determined that integration of OI&M functions and joint ownership of equipment and facilities by the BOC ILECs and their Section 272 affiliates created the potential for discrimination, anticompetitive conduct, and the shifting of costs from competitive to monopoly services. Those concerns are as valid today as they were in 1996 when the Commission addressed them in the *Non-Accounting Safeguards Order*. Indeed, as I have shown, existing requirements for allocating costs between regulated and nonregulated services, set out at 47 CFR §64.901(b)(4), will actually *support* the shifting of costs incurred for the benefit of competitive nonregulated services over to regulated monopoly services, since all that the BOC would need to do to accomplish this result is to *use* the newly-acquired equipment and facilities to furnish monopoly services, *whether or not such use is actually required.* While the BOCs have advanced various speculations and undocumented assertions regarding potential cost savings in their forbearance petitions, the potential impact upon regulatory responsibilities and costs, and the risks to nonaffiliated BOC competitors, from OI&M integration and joint ownership also need to be addressed. Those costs and risks are substantial, and would easily outweigh whatever "savings" the BOC 272 affiliates might realize. For all of these reasons, the prevailing OI&M separation and joint ownership prohibitions should remain in place.

The foregoing statements are true and correct to the best of my knowledge, information and belief.

Lee L. Selwyn

Statement of Qualifications

LEE L. SELWYN

Dr. Lee L. Selwyn has been actively involved in the telecommunications field for more than twenty-five years, and is an internationally recognized authority on telecommunications regulation, economics and public policy. Dr. Selwyn founded the firm of Economics and Technology, Inc. in 1972, and has served as its President since that date. He received his Ph.D. degree from the Alfred P. Sloan School of Management at the Massachusetts Institute of Technology. He also holds a Master of Science degree in Industrial Management from MIT and a Bachelor of Arts degree with honors in Economics from Queens College of the City University of New York.

Dr. Selwyn has testified as an expert on rate design, service cost analysis, form of regulation, and other telecommunications policy issues in telecommunications regulatory proceedings before some forty state commissions, the Federal Communications Commission and the Canadian Radio-television and Telecommunications Commission, among others. He has appeared as a witness on behalf of commercial organizations, non-profit institutions, as well as local, state and federal government authorities responsible for telecommunications regulation and consumer advocacy.

He has served or is now serving as a consultant to numerous state utilities commissions including those in Arizona, Minnesota, Kansas, Kentucky, the District of Columbia, Connecticut, California, Delaware, Maine, Massachusetts, New Hampshire, Vermont, New Mexico, Wisconsin and Washington State, the Office of Telecommunications Policy (Executive Office of the President), the National Telecommunications and Information Administration, the Federal Communications Commission, the Canadian Radio-television and Telecommunications Commission, the United Kingdom Office of Telecommunications, and the Secretaria de Comunicaciones y Transportes of the Republic of Mexico. He has also served as an advisor on telecommunications regulatory matters to the International Communications Association and the Ad Hoc Telecommunications Users Committee, as well as to a number of major corporate telecommunications users, information services providers, paging and cellular carriers, and specialized access services carriers.

Dr. Selwyn has presented testimony as an invited witness before the U.S. House of Representatives Subcommittee on Telecommunications, Consumer Protection and Finance and before the U.S. Senate Judiciary Committee, on subjects dealing with restructuring and deregulation of portions of the telecommunications industry.

In 1970, he was awarded a Post-Doctoral Research Grant in Public Utility Economics under a program sponsored by the American Telephone and Telegraph Company, to conduct research on the economic effects of telephone rate structures upon the computer time sharing industry. This work was conducted at Harvard University's Program on Technology and Society, where he was appointed as a Research Associate. Dr. Selwyn was also a member of the faculty at the College of Business Administration at Boston University from 1968 until 1973, where he taught courses in economics, finance and management information systems.

Dr. Selwyn has published numerous papers and articles in professional and trade journals on the subject of telecommunications service regulation, cost methodology, rate design and pricing policy. These have included:

> "Taxes, Corporate Financial Policy and Return to Investors"
> *National Tax Journal*, Vol. XX, No.4, December 1967.
>
> "Pricing Telephone Terminal Equipment Under Competition"
> *Public Utilities Fortnightly*, December 8, 1977.
>
> "Deregulation, Competition, and Regulatory Responsibility in the Telecommunications Industry"
> *Presented at the 1979 Rate Symposium on Problems of Regulated Industries - Sponsored by: The American University, Foster Associates, Inc., Missouri Public Service Commission, University of Missouri-Columbia*, Kansas City, MO, February 11 - 14, 1979.
>
> "Sifting Out the Economic Costs of Terminal Equipment Services"
> *Telephone Engineer and Management*, October 15, 1979.
>
> "Usage-Sensitive Pricing" (with G. F. Borton)
> (a three part series)
> *Telephony*, January 7, 28, February 11, 1980.
>
> "Perspectives on Usage-Sensitive Pricing"
> *Public Utilities Fortnightly*, May 7, 1981.
>
> "Diversification, Deregulation, and Increased Uncertainty in the Public Utility Industries"
> *Comments Presented at the Thirteenth Annual Conference of the Institute of Public Utilities*, Williamsburg, VA - December 14 - 16, 1981.
>
> "Local Telephone Pricing: Is There a Better Way?; The Costs of LMS Exceed its Benefits: a Report on Recent U.S. Experience."
> *Proceedings of a conference held at Montreal, Quebec - Sponsored by Canadian Radio-Television and Telecommunications Commission and The Centre for the Study of Regulated Industries, McGill University*, May 2 - 4, 1984.

"Long-Run Regulation of AT&T: A Key Element of A Competitive Telecommunications Policy"
Telematics, August 1984.

"Is Equal Access an Adequate Justification for Removing Restrictions on BOC Diversification?"
Presented at the Institute of Public Utilities Eighteenth Annual Conference, Williamsburg, VA - December 8 - 10, 1986.

"Market Power and Competition Under an Equal Access Environment"
Presented at the Sixteenth Annual Conference, "Impact of Deregulation and Market Forces on Public Utilities: The Future Role of Regulation"
Institute of Public Utilities, Michigan State University, Williamsburg, VA - December 3 - 5, 1987.

"Contestable Markets: Theory vs. Fact"
Presented at the Conference on Current Issues in Telephone Regulations: Dominance and Cost Allocation in Interexchange Markets - Center for Legal and Regulatory Studies Department of Management Science and Information Systems - Graduate School of Business, University of Texas at Austin, October 5, 1987.

"The Sources and Exercise of Market Power in the Market for Interexchange Telecommunications Services"
Presented at the Nineteenth Annual Conference - "Alternatives to Traditional Regulation: Options for Reform" - Institute of Public Utilities, Michigan State University, Williamsburg, VA, December, 1987.

"Assessing Market Power and Competition in The Telecommunications Industry: Toward an Empirical Foundation for Regulatory Reform"
Federal Communications Law Journal, Vol. 40 Num. 2, April 1988.

"A Perspective on Price Caps as a Substitute for Traditional Revenue Requirements Regulation"
Presented at the Twentieth Annual Conference - "New Regulatory Concepts, Issues and Controversies" - Institute of Public Utilities, Michigan State University, Williamsburg, VA, December, 1988.

"The Sustainability of Competition in Light of New Technologies" (with D. N. Townsend and P. D. Kravtin)
Presented at the Twentieth Annual Conference - Institute of Public Utilities Michigan State University, Williamsburg, VA, December, 1988.

"Adapting Telecom Regulation to Industry Change: Promoting Development Without Compromising Ratepayer Protection" (with S. C. Lundquist)
IEEE Communications Magazine, January, 1989.

"The Role of Cost Based Pricing of Telecommunications Services in the Age of Technology and Competition"
Presented at National Regulatory Research Institute Conference, Seattle, July 20, 1990.

"A Public Good/Private Good Framework for Identifying POTS Objectives for the Public Switched Network" (with Patricia D. Kravtin and Paul S. Keller)
Columbus, Ohio: *National Regulatory Research Institute*, September 1991.

"Telecommunications Regulation and Infrastructure Development: Alternative Models for the Public/Private Partnership"
Prepared for the Economic Symposium of the International Telecommunications Union Europe Telecom '92 Conference, Budapest, Hungary, October 15, 1992.

"Efficient Infrastructure Development and the Local Telephone Company's Role in Competitive Industry Environment" *Presented at the Twenty-Fourth Annual Conference, Institute of Public Utilities, Graduate School of Business, Michigan State University, "Shifting Boundaries between Regulation and Competition in Telecommunications and Energy"*, Williamsburg, VA, December 1992.

"Measurement of Telecommunications Productivity: Methods, Applications and Limitations" (with Françoise M. Clottes)
Presented at Organisation for Economic Cooperation and Development, Working Party on Telecommunication and Information Services Policies, `93 Conference "Defining Performance Indicators for Competitive Telecommunications Markets", Paris, France, February 8-9, 1993.

"Telecommunications Investment and Economic Development: Achieving efficiency and balance among competing public policy and stakeholder interests"
Presented at the 105th Annual Convention and Regulatory Symposium, National Association of Regulatory Utility Commissioners, New York, November 18, 1993.

"The Potential for Competition in the Market for Local Telephone Services" (with David N. Townsend and Paul S. Keller)
Presented at the Organization for Economic Cooperation and Development Workshop on Telecommunication Infrastructure Competition, December 6-7, 1993.

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The Cost of Universal Service, A Critical Assessment of the Benchmark Cost Model, Susan M. Baldwin with Lee L. Selwyn, a report prepared by Economics and Technology, Inc. on behalf of the National Cable Television Association and submitted with Comments in FCC Docket No. CC-96-45, April 1996.

Economic Considerations in the Evaluation of Alternative Digital Television Proposals, Lee L. Selwyn (as Economic Consultant), paper prepared for the Computer Industry Coalition on Advanced Television Service, filed with comments in FCC MM Docket No. 87-268, In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, July 11, 1996.

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The Effect of Internet Use On The Nation's Telephone Network, Lee L. Selwyn and Joseph W. Laszlo, a report prepared for the Internet Access Coalition, July 22, 1997.

Regulatory Treatment of ILEC Operations Support Systems Costs, Lee L. Selwyn, Economics and Technology, Inc., September 1997.

The "Connecticut Experience" with Telecommunications Competition: A Case in Getting it Wrong, Lee L. Selwyn, Helen E. Golding and Susan M. Gately, Economics and Technology, Inc., February 1998.

Where Have All The Numbers Gone?: Long-term Area Code Relief Policies and the Need for Short-term Reform, prepared by Economics and Technology, Inc. for the Ad Hoc Telecommunications Users Committee, International Communications Association, March 1998, second edition, June 2000.

Broken Promises: A Review of Bell Atlantic-Pennsylvania's Performance Under Chapter 30, Lee L. Selwyn, Sonia N. Jorge and Patricia D. Kravtin, Economics and Technology, Inc., June 1998.

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Dr. Selwyn has been an invited speaker at numerous seminars and conferences on telecommunications regulation and policy, including meetings and workshops sponsored by the National Telecommunications and Information Administration, the National Association of Regulatory Utility Commissioners, the U.S. General Services Administration, the Institute of Public Utilities at Michigan State University, the National Regulatory Research Institute at Ohio State University, the Harvard University Program on Information Resources Policy, the Columbia University Institute for Tele-Information, the International Communications Association, the Tele-Communications Association, the Western Conference of Public Service Commissioners, at the New England, Mid-America, Southern and Western regional PUC/PSC conferences, as well as at numerous conferences and workshops sponsored by individual regulatory agencies.